BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT A. COWAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 256,498
GRIFFIN WHEEL COMPANY	)	
Respondent	)	
AND	)	
	)	
AMSTED INDUSTRIES, INC.	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's October 27, 2000 preliminary hearing Order.

ISSUES

The Administrative Law Judge denied claimant's request for preliminary hearing benefits on the grounds that the injury did not arise out of claimant's employment. The Administrative Law Judge found claimant was injured by horseplay.

On appeal, claimant requests that the Appeals Board reverse the Administrative Law Judge and find claimant's injury did arise out of his employment with respondent. Claimant contends his injury did arise of the employment because the injury resulted from an assault by a co-worker over a dispute relating to the conditions and incidents of the employment. Also, the claimant argues, if the Appeals Board determines the assault did not occur as a result of a dispute over a condition of the employment, then claimant's injury is compensable because claimant's injury was caused by the concurrence of horseplay and the employment conditions.

Conversely, the respondent urges the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order. Respondent contends claimant's injury was caused by horseplay and, therefore, did not arise out of the employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Appeals Board finds the preliminary hearing Order should be reversed and remanded to the Administrative Law Judge.

Findings of Fact

1. On June 20, 2000, the date of claimant's alleged accident, claimant was 31 years of age and had been employed by respondent as a furnace operator for 4 years.

2. Claimant suffered a closed head injury on that date when he was shoved by a co-worker, Corey Adams (Adams), fell backward and hit the back of his head on respondent's concrete floor.

3. One of claimant's treating physicians, S. R. Reddy Katta, M.D., diagnosed claimant with a traumatic brain injury in the form of a frontal lobe contusion and linear skull fracture with cognitive communication, mobility and self-care limitations.

4. Claimant has no recollection of the June 20, 2000, incident when he was shoved by a co-worker, Adams, and suffered the closed head injury. In fact, claimant does not have any recollection of the events that occurred the entire week of the accident.

5. The events that led up to the shoving incident were described during the testimony of Adams and two other co-workers, Bob Boda (Boda) and Robert Amego (Amego). Boda was the other member of claimant's two-person crew that operated furnace number 1 for the respondent. Adams was a member of the two-person crew that operated furnace number 2. The furnaces are located 50 feet from each other. Amego was an overhead crane operator who witnessed the incident from approximately 40 feet above the location where claimant was shoved by Adams and fell.

6. Respondent manufactures steel railroad wheels. The furnaces melt down scrap metal that is loaded into the top of the furnace by the overhead crane. The metal is then used to form the steel wheels.

7. On the morning of June 20, 2000, claimant and Boda were preparing the furnace for "tapping" or pouring out the melted metal. One of the tasks required before the melted metal can be poured from the furnace is the "busting out the breast", which is cleaning the slag from the area around the furnace tap hole.

Both claimant and Boda were working side by side using pry bars to bust out the breast.

8. At that time Adams came over into furnace number 1 area to the "quencher", an area where the test samples of the melted steel are run. Because Adams saw claimant was having a tough time busting out the breast, Adams started teasing the claimant and calling him various names such as "wimp".

9. Boda finished his half of the job of busting out the breast before claimant. Boda then walked away from the hot furnace to cool off. Adams continued to tease and call claimant various derogatory names.

Finally, when claimant finished busting out the breast, he also walked away from the hot furnace. As claimant approached Adams, Adams testified claimant threw the pry bar to the floor but in Adams direction. The pry bar hit the floor on its point and took an unusual bounce and hit Adams on the ankle.

As claimant further approached Adams, Adams reached out and flipped claimant's hard hat off of his head and claimant caught the hard hat in his hand. At that time, Boda jokingly grabbed Adams in a bear hug and told claimant to get Adams. But claimant did not make any threatening moves toward Adams. After Boda released Adams and as claimant was walking past Adams, Adams shoved claimant in the chest. Claimant fell backwards and, depending on whether you believe Boda or whether you believe Adams, claimant either tripped over a 2-3 inch oxygen hose or hit his shoulders on the hose as he fell causing claimant to hit the back of his head hard on the concrete floor.

10. Adams testified he was not angry or upset when he shoved claimant. He testified he did not think claimant intended for the pry bar to hit him and the pry bar did not hurt his ankle. Moreover, Adams indicated there were no ill feelings between him and the claimant and he "just wasn't thinking" when he shoved claimant. Additionally, Adams testified he had no intention of hurting claimant when he shoved him.

11. Boda's and Adams' description of the incident was consistent except Boda testified that Adams flipped claimant's hard hat off claimant's head before claimant dropped the pry bar and before Boda grabbed Adams in a bear hug. Adams, however, testified he flipped claimant's hard hat off after claimant threw the pry bar down and then Boda placed him in a bear hug. Additionally, Boda testified that the oxygen hose somehow caught claimant's shoulders as he fell and caused claimant's head to whip backwards striking the concrete floor. In contrast, Adams testified after he shoved claimant backwards, claimant tripped over the oxygen hose and fell backwards on the concrete floor.

Amego, the overhead crane operator, testified that claimant threw the pry bar down before he observed claimant without a hard hat. Amego, however, did not observe every detail of the incident because his view was partially obscured and he was operating the crane and not observing the incident at all times.

12. Claimant, Boda and Adams all agreed that on a regular basis all had participated in good natured verbal exchanges and name calling. But all also testified that this was the first time any physical contact had taken place between them.

13. The respondent proved that it has a defined company policy and rules against horseplay or fighting at work. In this instance, both Boda and Adams were disciplined for their actions during this incident.

14. The respondent was generally aware that some of the workers had a custom of teasing and calling each other names. But the only examples of physical confrontation that had occurred in the past arose out of arguments over conditions related directly to the employment and those instances resulted in disciplinary action taken against the participants.

Conclusions of Law

1. The claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which that right depends.[1]

2. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred and means that the injury happened while the worker was at work in the employer's service.[2]

3. The Appeals Board finds there is no question that claimant was shoved and fell resulting in a closed head injury while he was at work in the respondent's service.

4. The phrase "out of employment" points to the cause or origin of the workers accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment where there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.[3]

5. The general rule in Kansas on the question of whether an injury to an employee at work as a result of an assault or horseplay arises "out of the employment" is restated in Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, Syl. ¶ 2, 909 P.2d 657 (1995), as follows:

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[1] *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

[2] Newman v. Bennett, 212 Kan. 562, Syl. ¶1, 512 P.2d 497 (1973).

[3] Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 4, 899 P.2d 1058 (1995).

> If an employee is assaulted by a fellow worker, *whether in anger or in play*, an injury so sustained does not arise "out of the employment" . . . unless the employer had reason to anticipate that injury would result if the two employees continued to work together. (Emphasis added.)

6. One exception to this general rule is where the assault arises from a dispute over conditions or incidents of employment.[4] In addition, if a worker's injury results from the concurrence of a personal condition and an employment condition, the injury is compensable.[5]

7. Another exception to the general rule stated above, is when the employee's injury is caused by the concurrence of the assault and the employment condition.[6]

8. The claimant vigorously argues that his injury was caused not by horseplay but was caused by an intentional assault. The Appeals Board disagrees and affirms the Administrative Law Judges conclusion that claimant's injury was the result of horseplay and not an assault.

The preliminary hearing record established that at all times all three of the employees that took part in the activities leading up to claimant's injury were not angry but were acting in a laughing and playful manner. Claimant did not intentionally try to harm Adams when he discarded the pry bar and likewise Adams did not intentionally injure claimant when he shoved claimant.

9. The Appeals Board does, however, agree with claimant's argument that the preliminary hearing record proves that the employment conditions exacerbated claimant's injury. The Appeals Board agrees with this argument and finds it is reasonable to conclude that the oxygen hose and the concrete floor, both conditions of respondent's premises, exacerbated claimant's closed head injury. The Appeals Board finds, therefore, since the concurrence of horseplay and the employment conditions caused claimant's injury, the injury is compensable.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's October 27, 2000, preliminary hearing Order is reversed and remanded to the Administrative Law Judge for a decision regarding all outstanding issues on claimant's preliminary hearing request for medical treatment and temporary total disability benefits.

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[4] *See* Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, Syl. ¶ 6, 455 P.2d 546 (1969).

[5] *See* Bennett v. Wichita Fence Co., 16 Kan. App. 2d 458, 460, 824 P.2d 1001 (1992).

[6] Baggett v. B & G Const., 21 Kan. App. 2d 347, 350, 900 P.2d 857 (1995).

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

c: Steven C. Alberg, Overland Park, KS
Randall W. Schroer, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director